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THE THEORY OF A "FEDERAL COMMON LAW." — Although it is the general policy of the federal courts to follow the decisions of the state courts on questions of interpretation of statutes, still, as a recent case shows, if the rights of the parties have been fixed by contract before the state courts have adjudicated upon the statute, the federal courts will exercise their independent judgment, and may declare a statute valid which the supreme court of the state has adjudged void as in contravention to the state constitution. *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532. In like manner, the common law rules laid down by the supreme court of the state may be disregarded by the federal courts.[1]

The cases establishing this latter doctrine have been made the basis of a theory that there is a federal common law as distinguished from that of the separate states. Starting with the proposition that the common law is adopted by the state itself and is promulgated in the decisions of its supreme court, it is contended that when the rules applied by the federal courts differ from those enforced by the state courts, the federal courts are following a law of their own. Since the judges describe this law as general in contradistinction to local,[2] it must be considered a federal common law. To strengthen this conclusion, appeal is made to the analogy of admiralty and maritime jurisdiction where unwritten law is enforced exclusively by the courts of the United States;[3] and on historical grounds it is maintained that the government of the United States has succeeded to the common law jurisdiction of Great Britain.

The argument from analogy to admiralty is hardly tenable, because, aside from the inherent difference between the admiralty and common law systems,[4] the analogy is equally applicable to criminal and civil common law; and it was early settled that the Federal courts have no common law jurisdiction in criminal cases.[5] The same answer might controvert the historical argument, were that argument supported by facts. Although the common law, in so far as it was suited to local conditions, existed in the separate colonies at the time of the Revolution,[6] it was never specifically adopted by the general government.[7] The Supreme Court by repeatedly affirming that there is no common law of the United States[8] has denied an implied adoption, and an examination of the cases where the federal courts apply rules different from those applied by the courts of the state in which the action arises, will show no true grounds for the contrary contention.

The laws of each state consist of the Constitution of the United States and the laws and treaties made under it, and the constitution, statutes and

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1 Baltimore & Ohio Railroad *v.* Baugh, 149 U. S. 368.

2 See Railroad Co. *v.* National Bank, 12 Ot. (U. S.) 14, 31–32; Myrick *v.* Michigan Central Railroad Co., 17 Ot. (U. S.) 102, 109.

3 See Murray *v.* Chicago & Northwestern Ry. Co., 62 Fed. Rep. 24.

4 See The Lottawanna, 21 Wall. (U. S.) 558.

5 United States *v.* Worral, 2 Dall. (U. S.) 384; see State of Penna. *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 563.

6 See U. S. *v.* Reid, 12 How. (U. S.) 363.

7 See Gatton *v.* Chic., R. I., & P. Ry. Co., 95 Ia. 112.

8 See Bucher *v.* Cheshire R. R. Co., 125 U. S. 555, 583–584.

common law of the state. The Constitution of the United States and the laws made under it are the laws of the state because expressly adopted by the people of the state.[9] The federal courts are, therefore, courts of the state, and as such administer state laws. That the federal court may differ from the state court in its interpretation of the common law, as in the principal case it differed from it in the interpretation of a statute, is due to the fact that they are courts of co-ordinate power with no common superior. Such difference in interpretation results in uncertainty as to what is the law but does not create two systems of law upon the same subject-matter. The conception of a federal common law as a "general system of jurisprudence hovering over local legislation and filling up its interstices" [10] is fundamentally opposed to the basic principle of our common law that there is no law apart from territory.

SUCCESSIVE ASSIGNEES OF A MORTGAGE DEBT, EACH WITH A LEGAL RES. — Both the courts which regulate the rights of successive assignees of the same *chose in action* by priority of notice to the obligor [1] and those which apply the rule of priority of assignment [2] agree that where the obligation is contained in an instrument the assignee who obtains the instrument prevails.[3] This harmony of opinion results from the general policy of equity not to deprive a purchaser of any legal advantage which he has acquired without taint of conscience. In applying this doctrine the courts have gone to great lengths. For example, when a party to an action had a common law right to refuse to testify, equity would not grant against a *bona fide* purchaser a bill for the discovery of evidence which would prejudice him in his honestly purchased rights.[4] Nor would it, in an action of ejectment, restrain him from setting up the purely technical and unmeritorious plea of a satisfied outstanding term in a third person.

In view of these principles, facts such as are presented by a late New York case seem to raise a rather complicated question. The obligee of a bond secured by mortgage assigned the debt and delivered the bond to A. Later he assigned the same debt to B, to whom he surrendered the mortgage deed. Both A and B were *bona fide* purchasers for value. *Syracuse Savings Bank* v. *Merrick*, 96 N. Y. App. Div. 581. The court was relieved of the necessity of deciding the case on its merits because A had failed to record his assignment as required by statute, but the same case has arisen where consideration of the registry system was not involved. The courts, starting with the well established rule of mortgage law that an assignment of the debt carries with it the security,[5] have held that A, who gets the debt by getting the instrument containing the obligation, is entitled to preference whether the assignment to him precedes [6] or follows [7] that to B.

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[9] Simonton, The Federal Courts, 2d ed., 31; see McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 403.

[10] Duponceau, Jurisdiction of Federal Courts 87.

[1] English, etc., Trust *v.* Brunton, [1892] 2 Q. B. 1; Third Nat. Bank of Philadelphia *v.* Atlantic City, 126 Fed. Rep. 413.

[2] Putnam *v.* Story, 132 Mass. 205.

[3] Bridge *v.* Connecticut Life Ins. Co., 152 Mass. 343; see *Re* Gillespie, 15 Fed. Rep. 734.

[4] See Emmerson *v.* Ind, Coope & Co., 33 Ch. D. 323.

[5] Whittemore *v.* Gibbs, 24 N. H. 484.

[6] Morris *v.* Bacon, 123 Mass. 58.

[7] Kernohan *v.* Manss, 53 Oh. St. 118; Boyle *v.* Lybrand, 113 Wis. 79.